



**Rule(s) Review Checklist Addendum**  
(This form must be filled out electronically.)

**This form is to be used only if the rule(s) was/were previously reviewed, and has/have not been amended subsequent to that review.**

All responses should be in **bold** format.

Document(s) Reviewed (include title): **WAC 458-20-194 (Doing business inside and outside the state)**

Date last reviewed: **September 19, 2000**

Reviewer: **Diane Bren**

Date current review completed: **March 10, 2004**

Briefly explain the subject matter of the document(s): **This rule explains the application of RCW 82.04.460, Business within and without state--Apportionment. The rule explains when apportionment is appropriate, and discusses the fact that separate accounting is the preferred method of apportioning income. When separate accounting is not available, then the cost of doing business method should be used.**

Type an "X" in the column that most correctly answers the question, and provide clear, concise, and complete explanations where needed.

**1. Public requests for review:**

YES	NO	
	<b>X</b>	Is this document being reviewed at this time because of a public (e.g., taxpayer or business association) request?

If "yes," provide the name of the taxpayer/business association and a brief explanation of the issues raised in the request.

**2. Related statutes, interpretive and/or policy statements, court decisions, BTA decisions, and WTDs:** (Excise Tax Advisories (ETAs), Property Tax Advisories (PTAs), and Interim Audit Guidelines (IAGs) are considered interpretive and/or policy statements.)

YES	NO	
	<b>X</b>	Are there any statutory changes subsequent to the previous review of this rule that should be incorporated?
<b>X</b>		Are there any interpretive or policy statements not identified in the previous review of this rule that should be incorporated? (An Ancillary Document Review Supplement should be completed for each and submitted with this completed form.)



X		Are there any interpretive or policy statements that should be repealed because the information is currently included in this or another rule, or the information is incorrect or not needed? (An Ancillary Document Review Supplement should be completed for each and submitted with this completed form.)
	X	Are there any Board of Tax Appeals (BTA) decisions, court decisions, or Attorney General Opinions (AGOs) subsequent to the previous review of this rule that provide information that should be incorporated into this rule?
X		Are there any administrative decisions (e.g., Appeals Division decisions (WTDs)) subsequent to the previous review of this rule that provide information that should be incorporated into the rule?
X		Are there any changes to the recommendations in the previous review of this rule with respect to any of the types of documents noted above? (An Ancillary Document Review Supplement should be completed if any changes are recommended with respect to an interpretive or policy statement.)

If the answer is “yes” to any of the questions above, identify the pertinent document(s) and provide a brief summary of the information that should be incorporated into the document.

- **The information in ETA 270.04.194 (Interest Income Derived from the Extension of Credit to a Party in Another State by a Washington Taxpayer with Business Situs in Both States) should be incorporated into the rule.**

The following ETA's should be repealed:

- **ETA 019.04.194 (Engaging in Business Within the State),**
- **ETA 269.04.194 (Out-of-State Engineering Firm Performing Services in this State which are Incidental to those Performed by its Out-of-State Office), and**
- **ETA 280.04.193/194 (Commissions Earned on Interstate Sales).**

An ancillary document review supplement has been completed regarding each of these ETA's.

**3. Additional information:** Identify any additional issues (other than those noted above or in the previous review) that should be addressed or incorporated into the rule. Note here if you believe the rule can be rewritten and reorganized in a more clear and concise manner.

**The Department's position is that there is no requirement to maintain a physical business situs within or without the state of Washington to be entitled or required to apportion gross income. This position is reflected in the following:**

- **Determination 88-476, 7 WTD 91 (1988), Where a Washington taxpayer performs geophysical investigation substantially or wholly in Alaska and Canada by sending its employees there to do on-site investigation and report writing, its income is not subject to Service B&O tax notwithstanding that the taxpayer had no physical place of business in the out-of-state location.**
- **Determination 90-132, 9 WTD 280-15 (1990), Taxpayer received commission income from sales as manufacturer's representative both in Washington and outside Washington. It paid taxes based on a separate accounting method, although its**



- headquarters were located in Washington. Such separate accounting is acceptable when the in-state administrative services are not rendered to the customer.
- **Determination 93-132, 13 WTD 271 (1994),** A taxpayer that does not maintain a place of business outside Washington is entitled to apportion service income when the out-of-state services performed are more than incidental.
  - **Determination 98-196, 19 WTD 19 (2000),** A Washington-based securities dealer is entitled to apportion its gross receipts between Washington and the numerous other states in which it markets securities through independent sales representatives that own and operate their own offices. The securities dealer has taxable nexus with those other states by entering their marketplaces to sell its services and products to customers in those states. Such out-of-state activities are more than incidental.
  - **Determination 02-0144, 22 WTD 182 (2003)** Employees who regularly visit Washington customers to sell software and provide consulting services, which enable the customers to access the taxpayer's web-site, provide nexus for Washington to tax the web-site access charges.

The rule should explain that both the in-state and out-of-state activities and/or locations must have contributed to the production of the income for apportionment to apply. The rule should also be revised to provide guidance as to how third-party costs are applied for purposes of apportioning income on a cost basis.

The rule should incorporate the discussion in Determination 01-006, 20 WTD 124, regarding the fact that the cost of doing business in Washington is not costs incurred in Washington, rather it is any cost, regardless of where incurred, that relates, directly or indirectly, to the Washington activities.

The rule should reference WAC 458-20-14601 for apportioning income of financial institutions.

**4. Listing of documents reviewed:** The reviewer need identify only those documents that were not listed in the previous review of the rule(s). Use “bullets” with any lists, and include documents discussed above. Citations to statutes, interpretive or policy statements, and similar documents should include titles. Citations to Attorney General Opinions (AGOs) and court, Board of Tax Appeals (BTA), and Appeals Division (WTD) decisions should be followed by a brief description (i.e., a phrase or sentence) of the pertinent issue(s).

Statute(s) Implemented:

- **RCW 82.04.310 (Exemptions-Public utilities-Electrical energy.)**
- **RCW 82.14.020 (Where retail sale occurs.)**
- **RCW 82.04.290 (Tax on international investment management services or other business or service activities.)**
- **RCW 82.04.293 (International investment management services - Definitions.)**
- **RCW 82.04.297 (Internet services-Definitions.)**
- **RCW 82.04.460 (Business within and without state--Apportionment.)**



Interpretive and/or policy statements (e.g., ETAs, PTAs, and IAGs):

- **ETA 280.04.193/194**    **Commissions Earned on Interstate Sales**
- **ETA 558.04.193**        **Foreign Sales Corporations**

Court Decisions:

Board of Tax Appeals Decisions (BTAs):

- **National Ad Company of Washington v. State of Washington, Department of Revenue, Docket No. 54151, May 11, 2000.** A company that generates its income from telemarketing soliciting within Washington for advertising space on maps that are given away free (both inside and outside Washington) is taxable under the Service B&O tax on its income. The taxpayer was allowed to apportion its revenues because the services rendered outside the state to distribute maps using third-party independent contractors are more than incidental.

Appeals Division Decisions (WTDs):

- **Determination 98-188, 18 WTD 291 (1998),** Royalty payments received by Taxpayer for assuming Parent's rights and obligations under a licensing contract with a third-party licensee are subject to Washington's B&O tax.
- **Determination 99-121, 19 WTD 153 (2000),** A leasing company that utilized out-of-state brokers to solicit business, arrange and coordinate financing activities, and write up financing contracts was entitled to apportion its income.
- **Determination 99-023, 19 WTD 340 (2000),** Amounts received by a Washington resident from the sale of an intangible asset are allocated to the commercial domicile of the owner.
- **Determination 00-027, 19 WRD 947 (2000),** A foreign corporation/taxpayer providing real property management services is entitled to apportion its gross income because the taxpayer maintained places of business both within and without Washington that contributed to the rendition of services within Washington.
- **Determination 99-223, 20 WTD 1 (2001),** Under the cost of doing business for the cost apportionment formula under Rule 194, a taxpayer's out-of-state travel costs should be included in the denominator and excluded from the numerator.
- **Determination 01-006, 20 WTD 124 (2001),** A place of business does not mean a physical location. Rather, if a taxpayer conducts activities in a state sufficient to create nexus under Washington standards, then the taxpayer is deemed to have a "place of business" in that state for apportionment purposes. The denominator of the cost apportionment formula is the total costs attributable to the related business activities partially performed in Washington. The numerator is the cost of doing the related business activities in Washington. The cost of doing business in Washington is not costs incurred in Washington, rather it is any cost, regardless of where incurred, that relates, directly or indirectly, to the Washington activities.
- **Determination 99-243, 20 WTD 338 (2001),** Addressing the fact that monitoring alarm signals that are out-of-state from a location within Washington are subject to the B&O tax.



- **Determination 01-188, 21 WTD 289 (2002), Conducting an annual industry convention or seminar as a discrete business activity, for which the taxpayer charges attendees a fee, generally creates nexus with the host state to tax the fee income.**
- **Determination 01-168E, 22 WTD 228 (2003) When a retailer did not lend money, but sold its products on a deferred installment basis to its credit card customers, the retailer's costs of borrowed funds used to replace inventory constituted an expense of its retailing activity, and cannot be used in calculating cost apportionment of its credit card finance charge income.**

Attorney General Opinions (AGOs):

Other Documents (e.g., special notices or Tax Topic articles, statutes or regulations administered by other agencies or government entities, statutes, rules, or other documents that were reviewed but were not specifically relevant to the subject matter of the document being reviewed):

- **Special Notice - Special Event Promoters and Vendors - New Requirements - Published July 1, 2003**
- **WAC 458-20-14601 (Financial institutions--Income apportionment.)**

#### 5. Review Recommendation:

<u>  X  </u>	<b>Amend</b>
<u>      </u>	<b>Repeal/Cancel</b> (Appropriate when action is not conditioned upon another rule-making action or issuance of an interpretive or policy statement.)
<u>      </u>	<b>Leave as is</b> (Appropriate even if the recommendation is to incorporate the current information into another rule.)
<u>      </u>	<b>Begin the rule-making process for possible revision.</b> (Applies only when the Department has received a petition to revise a rule.)

**Explanation of recommendation:** Provide a brief summary of your recommendation, whether the same as or different from the original review of the document(s). If this recommendation differs from that of the previous review, explain the basis for this difference.

If recommending that the rule be amended, be sure to note whether the basis for the recommendation is to:

- Correct inaccurate tax-reporting information now found in the current rule;
- Incorporate legislation;
- Consolidate information now available in other documents (e.g., ETAs, WTDs, court decisions); or
- Address issues not otherwise addressed in other documents (e.g., ETAs, WTDs, court decisions).

**The rule should be revised to clarify currently that there is no requirement to maintain a physical business situs within or without the state of Washington to be entitled or required to apportion gross income.**



**Examples should be provided in the rule regarding what would be considered to be an "incidental" activity for purposes of income apportionment.**

**6. Manager action:** Date: April 30, 2004

AL Reviewed and accepted recommendation

Amendment priority (to be completed by manager):

     1  
  X   2  
     3  
     4